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IN THE

Supreme Court of the United States

October Term, 1954

No. 365

T. A. LOVING & COMPANY, a corporation organized and existing under the laws of the State of North Carolina, Bank of Wayne Building, Goldsboro, North Carolina,

and

SOUTHEASTERN CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of North Carolina, 301 Second Street, Charlotte, North Carolina,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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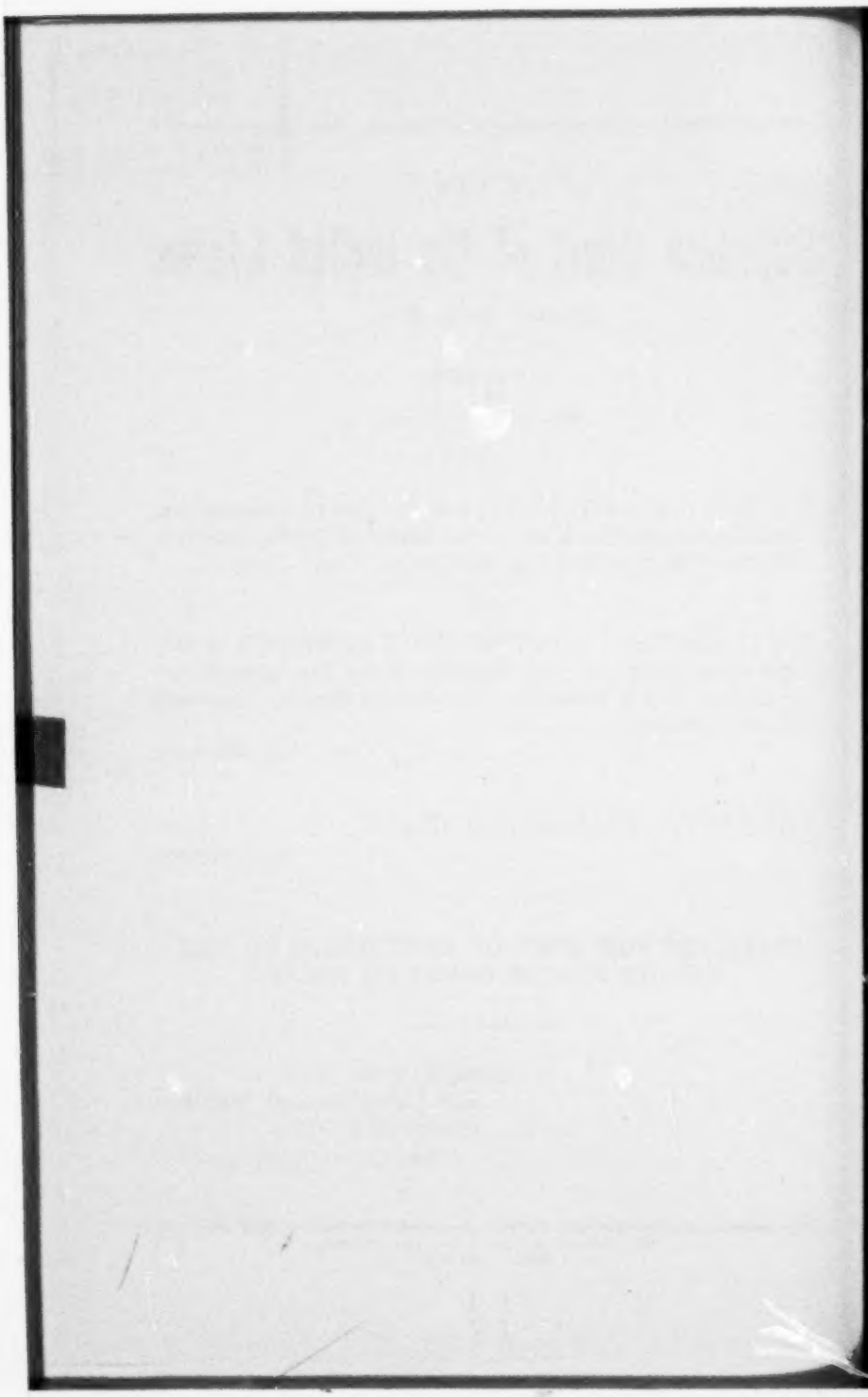

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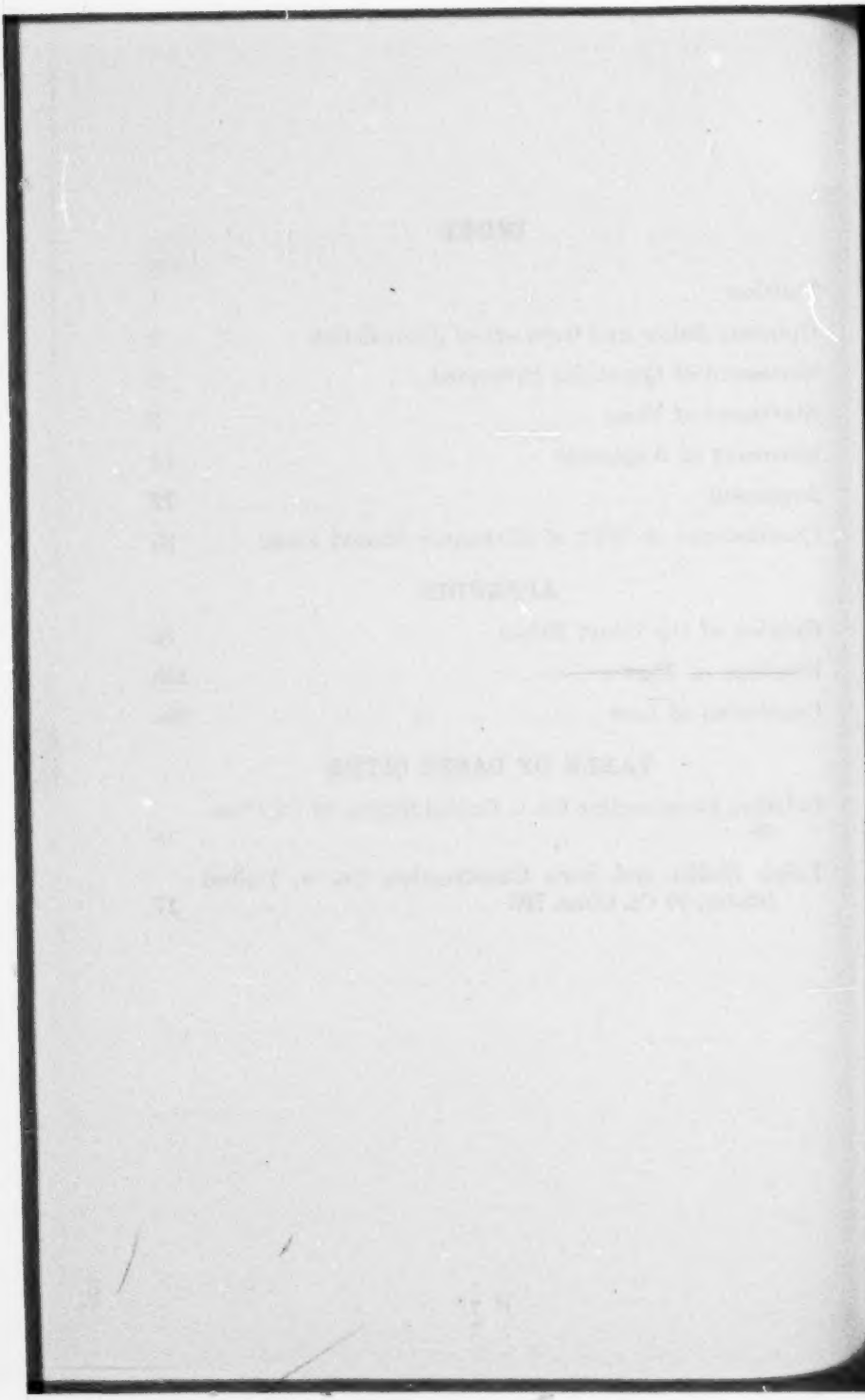

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners T. A. Loving & Company and Southeastern Construction Company, respectfully pray, for reasons good and sufficient as hereinafter stated, that a Writ of Certiorari issue to review an order entered June 7, 1955, by the

United States Court of Claims in cause No. 6-53 on its records.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The opinion of the United States Court of Claims in the within matter was promulgated on June 7, 1955, and is reported in ——— Court of Claims ———. A copy of said opinion is appended hereto.

Jurisdiction is conferred on this court by virtue of 62 Stat. 961, amended May 24, 1949, c. 139, Para. 106, 63 Stat. 104, 28 U. S. C. A., Section 2101; 62 Stat. 928, c. 646, June 25, 1948, 28 U. S. C. A., Section 1255.

STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

Whether the Court below, as a matter of law, erred in the construction and interpretation of the contract between the parties in holding that Petitioners were required to furnish "structural unglazed facing units" instead of structural unglazed units;

Whether, as a matter of law, in the construction and interpretation of a contract a court may properly look beyond the words "structural unglazed units" as they were used in the Finish Schedule and where they have a plain and definitive meaning which is clear in the context where used, to find that the words were intended to mean something other than their plain meaning in the instant use.

STATEMENT OF FACTS

1. Plaintiff T. A. Loving & Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal office at Goldsboro, North Carolina.

2. Plaintiff Southeastern Construction Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal offices at Charlotte, North Carolina.

3. The plaintiffs are engaged in business as general contractors for the construction of buildings and other works, and insofar as this petition is concerned, were and are acting as joint contractors and coadventurers.

4. On November 24, 1947, the office of the District Engineer, Huntington District, Corps of Engineers, U. S. Army, issued an invitation for bids for the construction of a Veterans' Administration Hospital at Beckley, West Virginia. The invitation was designated Serial No. W-46-022-eng 48-78 and was accompanied by specifications and drawings.

5. Plaintiffs formed a joint venture to undertake the performance of the general contract for the construction of the hospital at Beckley, entered their bid and the same was accepted. On February 19, 1948, Contract No. W-46-022-eng-1476 was executed between the plaintiffs and the United States for the construction of the Veterans' Administration Hospital and appurtenances, Beckley, West Virginia (except elevators, dumbwaiters and quarters). The contract price was $4,975,123.

The specifications referred Petitioners to the Finish Schedule for a determination of what materials should be used in any given area. The controversy herein involves the requirement of the Government that Plaintiffs install structural unglazed *facing* tile (or units) in the Boiler House or Garage of the hospital where Finish 51 is called for in the Finish Schedule.

The description of Finish 51 is contained in key sheet 40-04-ASHPE-1 (Pltffs' Ex. 8). In the vertical column marked "walls" opposite Finish 51, the letters "DO" appear, meaning "Ditto," and referring to the words

"structural unglazed units" appearing above. It is most important to note that the word "*facing*" is absent from this description, viz., the finish required is not "structural unglazed *facing* units." The Government required plaintiffs to install "structural unglazed *facing* units" in these areas, and plaintiffs contend that they could not properly be required to do so under the requirement of the Finish Schedule and of the Specifications, which, is above noted, called for "structural unglazed units."

In summing up the facts and issues in the case, the court below said (Opinion, p. 9):

> "This case turns upon the meaning of the phrase 'structural unglazed units.' Plaintiffs [Petitioners] assert that the term excludes facing tile and insist that the defendant's requirement that facing tile be used where the plans and specifications called for 'structural unglazed units' imposed an unauthorized additional expense upon the contractors for which defendant is liable. It is defendant's position that the phrase 'structural unglazed unit' means facing tile."

Again the court below said (Opinion, p. 3):

> "The question presented is whether the Specifications here involved required the use of facing tile when 'structural unglazed units' were called for on the Finish Schedule."

The pertinent sections of the contract specifications are as follows, and it should be kept in mind that on the Finish Schedule where Finish 51 is called for, the words "structural unglazed units" appear, and not the words "structural unglazed *facing* units."

> SC-2 *Drawings—contract drawings, maps and specifications.*—Ten sets of contract drawings, maps and specifications will be furnished the contractor without

charge. Additional sets will be furnished on request at the cost of reproduction. The work shall conform to the following drawings, all of which form a part of these specifications and are available in the Office of the Corps of Engineers, Department of the Army, at Huntington, West Virginia.

Drawing No.:	*Title*
40-04-ASHPE-1	Key Sheet
32-01-A-2	Basement Floor Plan
36-13-A-2	Plans

SECTION 4

MASONRY: BRICK AND STRUCTURAL TILE

4-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of brick and structural tile masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

402. APPLICABLE SPECIFICATIONS: The following Federal Specifications form a part of this specification:

HH-B-671c	Brick; Fire Clay.
QQ-B-71a	Bars; Reinforcement, (For) Concrete.
SS-B-656	Brick; Building (Common), Clay.
SS-B-681	Brick; Sand-Lime.
SS-T-316	Tile; Partition, Gypsum.
SS-T-341a	Tile; Structural, Clay, Load-Bearing, Wall.
SS-T-351a	Tile; Structural, Clay, Non-Load-Bearing.

4-03. MATERIALS: • • •

(g) *Structural Clay Tile:* Structural clay tile shall include all the standard shapes required to complete the construction, and shall conform to the following:

(1) *Load-Bearing Clay Tile:* Load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-341a, grade LB, and shall be of design shown on drawings. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall have a plaster base finish.

(2) *Non-Load-Bearing Clay Tile:* Non-load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-351a. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall be scored to receive the plaster. The tile shall have a clear ring when struck.

SECTION 5

MASONRY: STRUCTURAL FACING UNITS

5-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of the structural-facing-unit masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

5-02. ALTERNATE C: Attention is invited to the fact that Alternate C provides for the elimination of painted walls above the structural glazed tile wainscot for Room Finishes Nos. 5, 14, 17, 18, 19, 21, 31 and 32 and in lieu thereof provides for the construction of the entire wall from floor to ceiling of structural glazed tile for such room finishes. The contractor will be required to perform such work in accordance with the contract which will indicate whether the construction contemplated shall be in accordance with the basic specification or Alternate C.

5-03. APPLICABLE SPECIFICATION: The following Federal Specification forms a part of this specification:

SS-T-341a Tile; Structural, Clay, Load-Bearing, Wall.

5-04. GENERAL: Structural facing tile shall be installed in the spaces shown on the drawings and shall be glazed and unglazed units as hereinafter specified. Units shall be of the sizes indicated on the drawings, and all shapes and sizes shown or required for a complete and proper installation shall be furnished or cut on the job. Job cutting shall be by a motordriven saw

designed for the purpose. Cut edges shall be clean and sharp. Backs of units upon which plaster is to be applied shall be scored, combed, or roughened. Beds, ends, and backs upon which mortar or plaster is to be applied shall be reasonably free from glaze. Units shall be delivered, stored, and handled in a manner that will protect them from stain and damage. Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units.

(a) *Special Shapes:* Bullnose corners, bullnose caps, flush coved base and round top coved base, slope sills, standard radials (radius 4-foot), and coved interior corners shall be furnished where shown or specified. Unless otherwise specified, all external vertical corners, and external corners of sills, and caps shall be bullnose, base shall be flush on top and coved to meet floor finish, and internal corners shall be square.

5-05. STRUCTURAL FACING UNITS:

(a) *General Requirements:* Except as otherwise specified herein, structural facing units shall conform to the requirements of Federal Specification SS-T-341a. Structural facing units shall be made of selected fusible materials of the types hereinafter specified, carefully proportioned, thoroughly mixed, and burned as straight and true as careful manufacture can achieve to produce a strong homogeneous body that will give a sharp metallic-bell-like ring when struck. The minimum thickness of the outside shell at any point shall be not less than $\frac{5}{8}$ inch except that with side construction units with scored beds the minimum thickness of the top and bottom shells from the inner surface to the bottom of the grooves shall be $\frac{1}{2}$ inch, and with multicored units designed to be split for fractional lengths the minimum thickness from face to kerfing cores shall be $\frac{1}{2}$ inch. Where a structural facing unit wainscot is required to be finished flush with plaster above, such units shall have all corners sharp and square.

(b) *Types and Qualities:*

(1) *Ceramic-Opaque-Glazed Fire-Clay Units:* The body of all ceramic-glazed fire-clay units shall be of clear-burning, plastic, fire clay. The face or faces that will be exposed when units are in place shall be free from cracks and shall be covered with an opaque ceramic glaze. The glaze shall be compounded of metallic oxides, chemicals and clays, thoroughly ground together and sprayed upon the previously formed body and then fused to the body by burning the units at high temperatures to give a matte finish. The texture of the finish shall be smooth and the color shall be the manufacturers standard shade of green or cream tan, and shall conform to the approved samples. The glaze of select quality, ceramic-glazed fire-clay units shall be free from chips, crazes, blisters, crawling, or other imperfections detracting from the appearance of the finished wall when viewed from a distance of 5 feet. The faces of the units shall pass the tests hereinafter specified for imperviousness, opacity, fading, and resistance to crazing. Over-all dimensions of the face of units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the face of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 10 percent and for an average of 5 units shall be 8 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2500 psi and of any one side-construction unit shall be 1500 psi. The average compressive strength of 5 end-construction units shall be not less than 3000 psi and of 5 side-construction units shall be not less than 2000 psi.

(2) *Smooth Unglazed Units:* All smooth unglazed units shall be type FTX, heavy-duty, select quality. The body of all smooth unglazed units shall be manufactured of fire clay. The face or faces that will be ex-

posed when units are in place shall be free from cracks and shall have a smooth, unbroken, natural-die finish. The color of the faces shall be BUFF and shall conform to the approved samples. The finished face or faces of the smooth unglazed units shall be free from chips and other imperfections detracting from the appearance of the finished wall when viewed from a distance of 10 feet. Units having surface chips not in excess of ⅛ inch in from edges and ¼ inch in from corners will not be rejected. The faces of the units shall be highly resistant to staining and easily cleaned. Over-all dimensions of the face of the units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the faces of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 9 percent and for an average of 5 units shall be 7 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2000 psi and of any one side-construction unit shall be 1000 psi. The average compressive strength of any 5 end-construction units shall be not less than 2500 psi and of 5 side-construction units shall be not less than 1000 psi.

5-05. (b) (3) *Permissible Distortion of Face or Edges:* Distortions of the face from a plane, or the edges of the face from a straight line when measured as the maximum ordinate from the plane or line to the face or edge shall not exceed the amount given below.

TABLE I

Standard face dimensions (height and length) in inches	Maximum permissible distortion in inches 1
2⅝ x 7⅝	3/64
5 1/16 x 7⅝	1/16
5 1/16 x 11¾	3/32
3⅝ x 11¾	3/32
7⅝ x 11¾	3/32
7⅝ x 15¾	3/16

(4) *Compressive Strength:* Test for compressive strength shall be made in accordance with the methods described in Federal Specifications SS-T-341a.

On December 19, 1947, Addendum No. 1 was issued by the Huntington District Engineer which amended the Specifications accompanying the invitation for bids. The material amendments contained in Addendum No. 1 are as follows:

SPECIFICATION

* * * * *

(11) *Par. 4-01, Page 4-1.* In the fourth line of this paragraph, delete "installation of brick and structural tile masonry" and substitute the following therefor: "installation of brick, structural tile and concrete block masonry."

(12) *Par. 4-02, Page 4-1.* Add the following at the end of this paragraph: "SS-C-621. Concrete Units; Masonry, Hollow."

(13) *Par. 4-03 (g) (2), Page 4-3.* After this subparagraph, add the following subparagraphs:

(h) *Concrete Masonry Units:* Concrete masonry units may be used, at the contractor's option, instead of the corresponding type of structural clay tile and shall conform to the following:

(1) *Load-Bearing Units:* Load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type I, with weight of concrete 100 pounds or less per cubic foot. Units shall be of standard sizes and shapes including closers and shapes required by the construction, shall be free of any deleterious matter that will stain plaster or corrode metal, and shall be adequately cured before shipment.

(2) *Non-Load-Bearing Units:* Non-load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type II, with weight of concrete 100 pounds or less per cubic foot.

(14) *Par. 4-04, Page 4-3.* Add the following at the end of this paragraph:

"Concrete masonry units—2 of each type."

(15) *Par. 4-06 (c), Page 4-5.* Insert in the title of this subparagraph and in the first line after "structural clay tile" the following: "or concrete masonry units."

(16) *Par. 5-02, Page 5-1.* Delete the word "tile" appearing in the third and fifth lines of this paragraph and substitute the words "facing unit" therefor.

• • • • •

Petitioners believe that the foregoing are all of the specifications which are pertinent here; and it is upon these parts of the specifications, and upon the Key Sheet 40-04-ASHPE-1 where the Finish Schedule is contained and where, under Finish 51, the words "structural unglazed units" appear, that the controversy revolves.

SUMMARY OF ARGUMENT

Petitioners contend that the Court of Claims erred in construing the contract so as to require Petitioners to furnish facing tile instead of structural unglazed units; that the court, in so holding, looked beyond the words "structural unglazed units," which it had no right to do because the words "structural unglazed units" have a plain and definitive meaning themselves and are clear in the context of the Finish Schedule where they were used.

Petitioners arrive at their conclusions by the following: (I) That there is a marked and unquestioned difference, which is well known in the trade, between "structural unglazed *facing* units" on the one hand, and "structural unglazed units" on the other hand; (II) that "structural unglazed *facing* units" must conform to more rigid requirements as to appearance (uniformity of color, finish, limitations as to variation in size, etc.) than "structural unglazed units" and hence are more expensive; (III) that the specifications and the Finish Schedule call for "structural unglazed units" only; (IV) that the Finish 51 in the Finish Schedule is clear in itself and therefore the Court

below had no right to go elsewhere in the contract documents to find that the term "structural unglazed units" meant other than its plain and accepted meaning in the trade; and (V) that having been required to install a *facing* tile where it was not required by contract documents, Petitioners are entitled to reimbursement for the additional costs and expenses incurred. Petitioners further urge that even had the court had such license to look beyond the plain and customary meaning of the term "structural unglazed units" (which we deny that it did), it nevertheless misconstrued the contract because the Specifications referred to by the court as requiring Petitioners to furnish facing tile do not make such a requirement when properly read.

ARGUMENT

(I) There Is a Marked and Unquestionable Difference, Which Is Well Known in the Trade, Between Structural Unglazed Facing Units and Structural Unglazed Units (omitting the term "facing")

and

(II) "Structural Unglazed Facing Units" Must Conform to More Rigid Requirements and That Is the Distinction Between the Two Types of Units.

Testimony was introduced to show the significance of the term "facing" in the trade. This testimony is cited only to show the significance of the term in the trade. It is *not* cited because there is a dispute as to a question of fact involved; there is no disagreement here. In other words, the dispute is not the significance of the term "facing" but whether the contract documents require facing tile in the disputed areas. Petitioners claim that the Court below, in so finding, distorted the plain meaning of the contract and gave it a bent and unwarranted meaning.

Jacob Lichter, who has been in the masonry contracting business since 1924, and his qualifications and experience show that his knowledge of the customs and usage in the trade are the very highest, stated upon being questioned by his counsel as follows:

"Q. Mr. Lichter, I will ask you whether in the building trade there is a definable difference between the words 'structural units' and 'structural facing units.'

A. There is.

Q. Would you state that difference, please?

A. Structural units are units of building material for which the essential properties—I will restate that —in which specifications for properties are without any regard to appearance. Structural facing units are building units for which the specifications relate to properties, not only for strength and durability, but also for matters of appearance.

Q. Will you state whether, when the term structural unit is used as contradistinguished from the words 'structural facing units,' it means a different type of unit to the trade?

A. It does.

Q. Now, what is a structural facing unit? You have defined structural unit. What is a structural facing unit?

A. Well, I think I have defined a structural facing unit also. I said a structural facing unit is a building unit for which specifications relate to properties, not only for strength and durability, but also for matters of appearance.

Q. Is there any other way that structural units and structural facing units are distinguished, except by the use of the term 'facing'?

A. No, sir."

The foregoing shows that the term "facing" is the significant term used in detail to distinguish structural tile from structural facing tile.

Reference is made also to the book of Harry C. Plummer. Section 106 of his book, headed "Types of Structural Wall Tile," which reads as follows:

> "Structural wall tile may be divided into two groups, based upon the requirements for surface finish: (1) structural loadbearing and nonloadbearing tile for which factors governing appearance are not controlled by specifications;
>
> (2) Structural facing tile suitable for use where one or more faces will be exposed in the finished wall and for which specifications include requirements on color and finish."

What the foregoing mean is that when the term "facing" is interposed into the phrase structural unglazed tile, the meaning is changed and the tile required is a different and more expensive type of tile. Mr. Lichter's testimony is likewise clear in this respect when he testified as follows:

> "Q. Is there any other way that structural units and structural facing units are distinguished, except by the use of the term 'facing'?
>
> A. No, sir."

Finally, Mr. Malcolm H. Allen, the Government's witness (and the only one qualified to testify concerning masonry materials), testified as follows:

> "Q. What is the difference between a structural unit and a structural facing unit?
>
> A. A structural unit may be any building unit used in building construction where its function is to carry either its own weight or superimposed loads, and where there is no concern for appearance or surface coloration defects, etc. A structural facing unit is likewise a structural unit which must be loadbearing or be able to carry its own weight which also makes it suitable for exposed use.
>
> Q. So the difference between a structural unit and a structural facing unit is the propery of appearance?

A. That is correct.

Q. Then do I conclude from what you said—do I conclude properly, Mr. Allen—that the difference between *structural* units and *facing* units is the use of the term *facing*?

A. Considering those two terms side by side, yes, the difference would be in the word facing.

Q. Well, if you used 'facing,' you get a facing unit; and if you don't use 'facing unit,' you don't get a facing unit when it is specified, isn't that true? . . .

A. Well, that would be correct if that's all that was specified, yes, sir.

Q. What is the term used in the trade to describe a structural unglazed facing unit?

A. The complete and correct term would be the phrase you just used, 'structural unglazed facing unit.' "

It is indisputable, therefore, that when a structural facing unit is desired, the term "facing" must be used. This is and always has been Petitioners' contention, and it is confirmed by Mr. Allen, the Government's own witness. And, the Court below apparently agrees because it said (p. 20 of the Opinion):

> "It is conceded that the full self-contained description of the finish which plaintiffs were required to install in the disputed areas is 'structural unglazed facing units.' . . ."

(III) The Specifications Call for "Structural Unglazed Units" Only

and

(IV) The Finish Schedule and Finish 51 Is Clear in Itself and Therefore the Court Below Had No License to Go Elsewhere and to Read "Facing" Into the Words "Structural Unglazed Units."

Petitioners again point out that the term "facing" does not appear in Finish 51; in other words, that Finish 51 calls

for "structural unglazed units" and not "structural unglazed facing units." There being, as indicated above, the unquestioned difference in the terms, upon what reasoning could the Government require (and the Court below approve) "facing units" to be furnished by Petitioners?

The error of the court was committed at the outset. By looking at the specifications (Sections 4 and 5) to determine what kind of units were required in Finish 51 where "structural unglazed units" were called for, the court showed that it did not, in fact, go along with what there was no dispute about, viz., that the term "facing" distinguished the two types of structural units. The court thereby showed that it did not wish to follow what Mr. Allen, the Government's chief witness, said was the correct description of a "structural unglazed facing unit" (see page 15 hereof), or what the court called a "full self-contained description" of facing tile. What we mean to say is that if Mr. Allen is correct (as well as Mr. Lichter and the court) that "structural unglazed unit" means one thing and "structural unglazed facing unit" means something else, what right has the court to go to Sections 4 and 5 of the specifications to read "facing" into the words "structural unglazed units" in the Finish 51 of the Finish Schedule? True, the court (and the Contracting Officer) would have the right to look at the specifications to see what kind of "structural unglazed units" were required, but *not* to find out whether "structural unglazed units" meant that or meant practically its opposite, "structural unglazed *facing* units."

Stated in another way—and perhaps more legalistically—the plain and ordinary meaning of "structural unglazed units" is clear in itself and is not ambiguous; not being ambiguous, there is no license to look for implications or to look elsewhere for its meaning. This is the nub of the court's error. What the court did, to be blunt about it,

was to assume that appearance was a factor and then set out to prove that "facing" units were called for. We will show under (V) below that even were the court permitted to adopt this approach it is wrong, but suffice it to say here that the court is not warranted in refusing to analyze the words "structural unglazed units" as they appear in the Finish Schedule. There is no reason to look for a strained construction when the plain meaning of the words is fitting and the context plain. In *Ralph Sollitt and Sons Construction Co.* v. *United States,* 80 Ct. Clms. 798, this same court said:

> "The evidence shows that in the building trade there is a well-defined difference between 'vitrified fire clay tile.' The distinction is not only in the cost of the tile, but also in the handling. There is no mention in Alternative A of glazed tiles. The defendant contends that the provision in this Alternative—'vitrified clay tiles and the method for erecting them, shall conform to the applicable requirements of Section 6'—referred to the class of tile, and, as glazed tiles are named in section 6 for the wainscots, when the two sections are read together the contract could mean glazed tiles were called for under the Alternative. We can see no reason for such a strained construction of the plain words of the contract. The reference to Section 6 was applicable to the method of erection of the tiles, and cannot possibly be construed to mean the class of tiles to be used. . . ."

What Petitioners are suggesting is that the Court of Claims should have followed its own pronouncements and not strain to uphold the Government.

On page 10, the Court said that "it is clear that appearance was a primary consideration in Section 5 . . ." and goes on to argue that, hence, consideration of appearance must be used in determining the meaning of the term "structural unglazed units" in the Finish Schedule (page

10). Section 5, other than Paragraphs 5-02 and 5-04, is purely descriptive of structural facing units; other than in these two paragraphs, it contains no instructions for the use of any material in any specific location. The Court has read into this purely descriptive section a requirement that such facing tile be used in the Boiler House and Garage because of alleged consideration of appearance. Apparently, too, the Court has assumed that "structural unglazed units," unless they are "facing" units, would not be proper for use where exposed to view because of such consideration. We submit that this is untrue, and there is nothing in the record to support such a deduction. We further submit it is not the function of this Court to attempt to say which is the proper material to be used in any specific location. Most assuredly, it is not the function of the Court, contrary to the plain meaning of the term "structural unglazed units," to say that such units are not proper for use where exposed in a Boiler House and Garage, and hence, that the more expensive structural unglazed facing units must be used.

On page 10, the Court further says that structural facing tile is the subject of Section 5-04, and goes on to argue that everything in that section has to do with such structural facing tile. This is untrue on its face; the subject of this section is "General," and the references to materials and work in this section are clearly and distinctly separate, and interpretable only from the language of each sentence.

Finally, it should be observed that if it becomes necessary, as the Court has found, to imply a meaning into the term "structural unglazed units" (which we deny), an ambiguity is pointed to, and any implication of any ambiguity, or of its result, must be resolved against the writer of the specifications, i.e., the Government. *Callahan Construction Co.* v. *United States*, 91 Ct. Clms. 38.

This, of course, the Court did not do; this is clear if anything is clear. No ambiguity was resolved against the Goernment. What the Court here did was to avoid the rules of interpretation of contracts where an ambiguity is found to exist (which it did when it went beyond the words "structural unglazed units" of Finish 51) by stating that the interpretation was "relatively simple" and thus sidestepped the whole question of ambiguities.

The Court was insistent upon following the interpretation of its Commissioner and the contracting officer. As illustrative of this insistence we point to that section of the Court's opinion (p. 10; second full paragraph) concerning the testimony of the liaison engineer, Mr. Brown. His testimony sounds good in support of the Court's conclusion, especially where the Court says that Petitioners abided by Mr. Brown's interpretation without protest. The fact is, though, that what the Court says is untrue. The true picture of this situation is as follows:

Mr. Brown testified that he was the liaison officer who made frequent inspection visits to the job, but in the long ensuing period after construction, whether from August, 1948 to March, 1950, or whether from July, 1949 to March, 1950, he had failed to raise the question.

The dispute on the type of tile to be used in the Boiler House and Garage came up in *the fall of 1949*. Mr. Brown raised the question about the type of tile to be used in the basement rooms in *March, 1950* (Pltffs.' Ex. 9). It follows then that the question with reference to the basement rooms came up several months *after* the controversy arose in connection with the Boiler House and Garage, and obviously was merely a face-saving action to rationalize the ruling in connection with the Boiler House and Garage.

The controversy about the use of cinder block in these basement rooms was one of several controversies that were in existence at the time between the Government and Plain-

tiffs. As *part of an overall settlement of these several controveries,* Plaintiffs agreed to make certain changes in these rooms. Testimony in this regard (R. p. 186) is as follows:

> "By Mr. Steer:
> Q. Do you know that at the time, whenever it was—I'm not relating to time, but when you discovered the cinder block in the main building and either instructed the resident engineer or took steps to have the proper finish, as proper in your opinion, installed, that there were other arguments and controversies in the job concerning what should and should not be done on the job?
> A. There were many controversies.
> Q. And don't you know that the contractor's decision to accept your decision on the cinder block and to apply the matt glazed tile as it was applied was a part of an overall settlement of this and other controversies? And if you don't know, say you don't know. I'm not——
> A. Yes."

Subsequently Mr. Brown attempted to change his testimony in this regard, but this attempt proved abortive (R. pp. 187 and 188).

(V) Even Though It Were Held That the Court Could Look Beyond the Words of Finish 51, "Structural Unglazed Units," Sections 4 and 5 Do Not Require Petitioners to Furnish Facing Tile; the Specifications Call for "Smooth Structural Unglazed Units" for Areas Taking Finish No. 51: They Do Not Call for "Smooth Unglazed Structural Facing Units."

The words "structural unglazed units" are definitive, and they have a definite meaning in the trade as shown above. It is important to note that they refer to *any* building unit, whether of tile, brick, concrete block, or stone, the specifications for whose properties relate to strength and durability, without regard to appearance (R. pp. 19-

20). All of the Government's Exhibits 1, 2, 3, 4 and 9 are "structural unglazed units" (Tucker, R. p. 208, Allen, pp. 216, 217).

Structural tile are defined and described in Federal Specifications SS-T-341a and SS-T-351a (Pltffs.' Exs. 3 and 4 respectively), both of which specifications are mentioned in Sections 4 and 5 of the job specifications. They are likewise "structural units." They are *normally "unglazed,"* unless otherwise specified, and the word "unglazed" (meaning merely absence of glaze) is usually omitted (R. pp. 20-21). The term "unglazed" is not used in the above-mentioned Federal Specifications because the manufacturing process they describe can result only in an "unglazed" unit. Article D-1 of both specifications refers to "The die skin of the tile," obviously the natural unglazed finish of the material. Article I-3 of Specification SS-T-351a and Article I-4 of Specification SS-T-341a refer to the variation of the color of the tile with the degree of burning, again clearly referring to the natural unglazed finish.

Hence, structural tile is defined by these *Federal Specifications* is "structural unglazed tile" only. It is not facing tile (Lichter R. pp. 20-21; Bingham R. p. 63).

Structural unglazed *facing* tile is described in Paragraph 5-05 (b)(2). This paragraph is a sub-paragraph *under* Paragraph 5-05, entitled "Structural Facing Units," and describes one of the "types and qualities" of facing tile listed. That it refers to structural facing tile *only* is further shown by the reference to "Type FTX," which is the designation (R. pp. 23, 59) of one of the types of facing tile described in ASTM Specification G212-52 entitled "Tentative Specifications for Structural Clay Facing Tile" (R. pp. 16, 18; Pltffs.' Ex. 5). It should be clear then that Paragraph 5-05 (b)(2) refers only to unglazed *facing* tile.

The significance of the use of the word "facing" has already been mentioned. The witnesses all agree that when

the term "facing" is used, a different and more expensive type of tile is referred to then when the term is omitted. The term "facing" is not used in connection with Finish No. 51 of the Finish Schedule, nor is it used in the last sentence of Paragraph 5-04. Plaintiffs submit that this language must be read as it stands in the absence of this essential and significant term.

The non-use of the term "facing" in the Finish Schedule and in Paragraph 5-04 is clearly not inadvertent. Paragraph 5-04 refers to the Finish Schedule; it must therefore have been written *after* the Finish Schedule was prepared. Because of the significance in the trade of the term "facing," the specification writer, if he had so intended, could have here inserted the term and thereby eliminated any question (if any question existed) as to the meaning intended. Failing this, he could have inserted the word "facing" in Paragraph 5-04 at the time Addendum No. 1 was issued, as was done in the amendments to Paragraph 5-02 by Item 16 of this Addendum. Hence, it must be clear that the specification writer *did not intend* that facing tile be used where Finish 51 was specified.

It is noteworthy, too, that it would have been a simple matter, if that were the intent, to so show by the addition of a few words, other than the word "facing," to the language of Paragraph 5-04. The significant sentence could have been made to read "structural unglazed units marked in Finish Schedule shall be smooth, unglazed units *as called for in Paragraph 5-05(b)(2).*" Or it could have been made to read "structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units, Type FTX." Either of these changes, or the use of the term "facing" would have conveyed the idea that the more expensive tile was desired. In the absence of such language, Petitioners submit that it is obvious that facing tile, the more expensive type of tile, *was not desired.*

The last sentence of Paragraph 5-04, in addition to the fact that the term "facing" is not used, shows in still another way, by its own language, the intent that structural clay tile as called for in Federal Specifications SS-T-341a and SS-T-351a is desired, and that facing tile is not being called for. This sentence changes the language in the Finish Schedule merely by the addition of the word "smooth," thereby indicating an *election* of the smooth finish from several finishes available. Such an election *is not possible* with facing tile, as Type FTX tile is *always smooth* (R. p. 23; also Pltffs.' Ex. 5, Article 2); it comes in *only one* type of finish. Such an election is possible *only* with structural clay tile as described in Federal Specifications SS-T-341a and SS-T-351a, because the tile in these specifications come in *several* finishes, one of which is smooth (R. pp. 21 and 58; Article B-2 of both Petitioners' Exs. 3 and 4). Hence, it should be clear from the language of Paragraph 5-04 alone that only structural tile is called for, and that facing tile is not called for.

The Court indicates that Petitioners concede that in . . . Section 5-04, structural unglazed units are "identified" as smooth unglazed units. This is not true. Plaintiffs concede only what Section 5-04 states, namely, that the structural unglazed units called for in the Finish Schedule (which might be any of several finishes as pointed out above) are to be smooth unglazed units.

The Court indicates that Petitioners say that the expression "smooth unglazed units" is not sufficiently definite to indicate facing tile. This is not true. On the contrary, Petitioners contend that the term "smooth unglazed units" definitely has no reference to and excludes "facing tile" by reason of the fact, as shown above, that the term "facing," the essential and distinguishing term, is not used in the term "smooth unglazed units." And, as shown above (supra, pages 21 and 22), the term "smooth unglazed units"

in Paragraph 5-05(b)(2) has no relevance as that paragraph refers clearly to smooth unglazed *facing* units only.

The Court says (p. 20) that the term "structural facing units" would not be sufficiently definite because such units might be either glazed or unglazed. This is untrue, and demonstrates the Court's complete failure to understand the problem. The testimony shows that there are several kinds or types of units (or tile); that there are structural units and that there are structural facing units; that there are structural unglazed units and structural glazed units; and that there are structural unglazed facing units and structural glazed facing units; and that the correct term must be used for each in order to differentiate between them (R. pp. 23, 24, 213, 216). It is true that the word "unglazed" is sometimes omitted as superfluous in speaking of "structural unglazed facing units," as the word "unglazed" means merely "without glaze"; this is the manner in which the material is manufactured unless put through the additional operation of glazing. There is nothing, however, in the Record to indicate that the word "facing" may be omitted either when unglazed facing units are desired or when glazed facing units are desired. On the contrary, the testimony of all witnesses, both plaintiffs' and defendants', shows that the word "facing" is the essential and definitive word to distinguish the cheaper type of unit from the more expensive.

The Court says, too, that the word "unglazed" indicates in the trade that a product is called for which might in some instances be either glazed or unglazed. This again is untrue, and again demonstrates the failure of the Court to understand the problem. The testimony clearly shows that to obtain a glazed unit, the term "glazed" must be used; and that, if the term "glazed" is not used, or if the term "unglazed" is used, unglazed tile is referred to. The Commissioner's finding is contrary and does violence to the

meaning of the words "glazed" and "unglazed," both in the common usage and in the language of the trade.

Again (p. 20) the Court places some reliance upon its feeling of the straw man that it puts up, that the expression "structural facing units" would not be sufficiently definite. Petitioners concede that, but what of it? The fact that one phrase is not definite enough does not per se make another phrase indefinite. The correct term must be used if a specific material is to be required. Obviously, the writer of these specifications intended that any of the several units meeting the definition of structural unglazed units would be satisfactory for the finish of the boiler house and garage.

CONCLUSION

In conclusion it is urged that a Writ of Certiorari issue. The question of law here involved is of importance, not only because Petitioners have at stake a sum of money not inconsiderable in amount, but the Court should always use its supervisory power to assure litigants that the courts will correct errors of law committed below. Truly, great vigilance should be exercised in this function of the Court, because it is within this function that courts below may oftener than most fail to do justice to litigants. Here, we submit, the Court went out of its way to give a distorted interpretation to the plain words of the contract with an accepted meaning in the trade. This Court should not permit this to stand.

Respectfully submitted,

PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Petitioners.

APPENDIX

Opinion of the Court Below, Including Findings of Fact and Conclusion of Law

IN THE

United States Court of Claims

No. 6-53

(Decided June 7, 1955)

T. A. LOVING & COMPANY, a corporation organized and existing under the laws of the State of North Carolina, Bank of Wayne Building, Goldsboro, North Carolina,

and

SOUTHEASTERN CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of North Carolina, 301 West Second Street, Charlotte, North Carolina,

v.

THE UNITED STATES.

Mr. Paul W. Steer for the plaintiffs. *Messrs. Steer, Strauss & Adair* were on the briefs.

Miss Frances L. Nunn, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Wilson Myers* and *Mr. William R. Stern II* were on the briefs.

OPINION

Opinion, Page 1

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, contractors for the construction of the Veterans' Administration Hospital, Beckley, West Virginia, were required by the contracting officer to install facing tile in the walls of the hospital's boiler house and garage where the specifications called for "structural unglazed units." It is plaintiffs' position that this language permitted the use of cinder block. They claim the difference between the cost of installing facing tile and cinder block.

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The plaintiffs, coadventurers, were successful bidders on the Veterans' Administration Hospital at Beckley, West Virginia. On February 19, 1948, a contract was executed for construction of the hospital. The contract price was $4,975,123.

The Finish Schedule on the key sheet which formed part of the plans and specifications indicated that wall finishes 50 and 51 should be "struc. unglazed units." Section 5-04 of the specifications stated that "structural unglazed units marked in Finish Schedule * * * shall be smooth unglazed units." Smooth unglazed units are described in detail in section 5-05, where, in subsection (b) (2), it is provided that all smooth unglazed units shall be manufactured of fireclay, shall be free from cracks with a smooth, unbroken, natural-die finish, and shall be buff in color.

Addendum No. 1 amended section 4 which related to brick and structural tile to permit the use of cinder block as an alternative to structural clay tile. Section 5, entitled "Masonry: Structural Facing Units," was not so amended.

Plaintiffs employed the Southern Fireproofing Company as subcontractors to construct the interior walls in the hos-

pital, in the boiler house and garage, and in the pump and meter house. The work was in progress when Samuel F. Brown, defendant's liaison engineer on the Clarksburg and Beckley hospital projects, discovered that cinder blocks were being installed in the walls of a basement room in the "Beckley" hospital. The Finish Schedule indicated that the walls of this room were to be "struc. unglazed units." The discovery was the first indication Mr. Brown had that plaintiffs were interpreting the phrase "structural unglazed units" in the Finish Schedule to permit the use of cinder blocks. To save the additional expense and loss of time which would ensue had the completed wall structure been removed, plaintiffs were permitted to cover the exposed cinder blocks with "soaps" of matte glazed tile, a non-load-bearing facing tile, which gave the same appearance as the structural unglazed units specified. Plaintiffs made the necessary adjustments without protest and without claim for additional costs.

Thereafter, under the instruction of defendant's resident engineer, who had been cautioned by Mr. Brown to make

sure that the proper finish was used in the boiler house and garage where the Finish Schedule specified structural unglazed units, plaintiffs installed unglazed facing tile. They then claimed the sum of $19,284.29, representing the difference in the cost of installing facing tile over cinder block. The sum of $14,752.92 of this claim represented costs of the subcontractor. The claim was denied by the contracting officer and by the Army Board of Contract Appeals of the Corps of Engineers acting for the Secretary of the Army.

The question presented is whether the specifications here involved required the use of facing tile when "structural unglazed units" were called for on the Finish Schedule.

The pertinent provisions of the contract and specifications are as follows:

SPECIFICATIONS

SC-2 *Drawings—contract drawings, maps and specifications.*—Ten sets of contract drawings, maps and specifications will be furnished the contractor without charge. Additional sets will be furnished on request at the cost of reproduction. The work shall conform to the following drawings, all of which form a part of these specifications and are available in the Office of the Corps of Engineers, Department of the Army, at Huntington, West Virginia.

Drawing No.:	*Title*
40-04-ASHPE-1	Key Sheet
32-01-A-2	Basement Floor Plan
36-13-A-2	Plans

SECTION 4

MASONRY, BRICK AND STRUCTURAL TILE

401. *Scope:* The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of brick and structural tile masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

402. *Applicable Specifications:* The following Federal Specifications form a part of this specification:

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HH-B-671c	Brick; Fire Clay.
QQ-B-71a	Bars; Reinforcement, (For) Concrete.
SS-B-656	Brick; Building (Common), Clay.
SS-B-681	Brick; Sand-Lime.
SS-T-316	Tile; Partition, Gypsum.
SS-T-341a	Tile; Structural, Clay, Load-Bearing, Wall.
SS-T-351a	Tile; Structural, Clay, Non-Load-Bearing.

4-03. *Materials:* • • •

(g) *Structural Clay Tile:* Structural clay tile shall include all the standard shapes required to complete the construction, and shall conform to the following:

(1) *Load-Bearing Clay Tile:* Load-bearing clay tile shall conform to the requirements of Federal Specifications SS-T-341a, grade LB, and shall be of design shown on drawings. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall have a plaster base finish.

(2) *Non-Load-Bearing Clay Tile:* Non-load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-351a. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall be scored to receive the plaster. The tile shall have a clear ring when struck.

SECTION 5

MASONRY: STRUCTURAL FACING UNITS

5-01. *Scope:* The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of the structural-facing-unit masonary, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

5-02. *Alternate C:* Attention is invited to the fact that Alternate C provides for the elimination of painted walls above the structural glazed tile wainscot for Room Finishes Nos. 5, 14, 17, 18, 19, 21, 31 and 32 in lieu thereof provides

for the construction of the entire wall from floor to ceiling of structural glazed tile for such room finishes. The con-

tractor will be required to perform such work in accordance with the contract which will indicate whether the construction contemplated shall be in accordance with the basic specification or Alternate C.

5-03. *Applicable Specification:* The following Federal Specification forms a part of this specification:

SS-T-341a Tile; Structural, Clay, Load-Bearing, Wall.

5-04. *General:* Structural facing tile shall be installed in the spaces shown on the drawings and shall be glazed and unglazed units as hereinafter specified. Units shall be of the sizes indicated on the drawings, and all shapes and sizes shown or required for a complete and proper installation shall be furnished or cut on the job. Job cutting shall be by a motordriven saw designed for the purpose. Cut edges shall be clean and sharp. Backs of units upon which plaster is to be applied shall be scored, combed, or roughened. Beds, ends, and backs upon which mortar or plaster is to be applied shall be reasonably free from glaze. Units shall be delivered, stored, and handled in a manner that will protect them from stain and damage. Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glazed units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units.

(a) *Special Shapes:* Bullnose corners, bullnose caps, flush coved base and round top coved base, slope sills, standard radials (radius 4-foot), and coved interior corners shall be furnished where shown or specified. Unless otherwise specified, all external vertical corners, and external corners of sills, and caps shall be bullnose, base shall be flush on top and coved to meet floor finish, and internal corners shall be square.

5-05. *Structural Facing Units:*

(a) *General Requirements:* Except as otherwise specified herein, structural facing units shall conform to the

requirements of Federal Specification SS-T-341a. Structural facing units shall be made of selected fusible materials of the types hereinafter specified, carefully proportioned, thoroughly mixed, and burned as straight and true

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as careful manufacture can achieve to produce a strong homogeneous body that will give a sharp metallic-bell-like ring when struck. The minimum thickness of the outside shell at any point shall be not less than 5/8 inch except that with side construction units with scored beds the minimum thickness of the top and bottom shells from the inner surface to the bottom of the grooves shall be 1/2 inch, and with multicored units designed to be split for fractional lengths the minimum thickness from face to kerfing cores shall be 1/2 inch. Where a structural facing unit wainscot is required to be finished flush with plaster above, such units shall have all corners sharp and square.

(b) *Types and Qualities:*

(1) *Ceramic-Opaque-Glazed Fire-Clay Units:* The body of all ceramic-glazed fire-clay units shall be of clear-burning, plastic fire clay. The face or faces that will be exposed shall be covered with an opaque ceramic glaze. The glaze shall be compounded of metallic oxides, chemicals and clays, thoroughly ground together and sprayed upon the previously formed body and then fused to the body by burning the units at high temperatures to give a matte finish. The texture of the finish shall be smooth and the color shall be the manufacturer's standard shade of green or cream tan, and shall conform to the approved samples. The glaze of select quality, ceramic-glazed fire-clay units shall be free from chips, crazes, blisters, crawling, or other imperfections detracting from the appearance of the finished wall when viewed from a distance of 5 feet. The faces of the units shall pass the tests hereinafter specified for imper-

viousness, opacity, fading, and resistance to crazing. Over-all dimensions of the face of units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the face of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 10 percent and for an average of 5 units shall be 8 percent. Requirements for minimum absorption will be

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waived. The minimum compressive strength of any one end-construction unit shall be 2500 psi and of any one side-construction unit shall be 1500 psi. The average compressive strength of 5 end-construction units shall be not less than 3000 psi and 5 side-construction units shall be not less than 2000 psi.

(2) *Smooth Unglazed Units:* All smooth unglazed units shall be type FTX, heavy-duty, select quality. The body of all smooth unglazed units shall be manufactured of fire clay. The face or faces that will be exposed when units are in place shall be free from cracks and shall have a smooth, unbroken, natural-die finish. The color of the faces shall be BUFF and shall conform to the approved samples. The finished face or faces of the smooth unglazed units shall be free from chips and other imperfections detracting from the appearance of the finished wall when viewed from a distance of 10 feet. Units having surface chips not in excess of ⅛ inch from edges and ¼ inch in from corners will not be rejected. The faces of the units shall be highly resistant to staining and easily cleaned. Over-all dimensions of the face of the units shall not differ by more than 1.5 percent

over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the faces of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 9 percent and for an average of 5 units shall be 7 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2000 psi and of any one side-construction unit shall be 1000 psi. The average compressive strength of any 5 end-construction units shall be not less than 2500 psi and of 5 side-construction units shall be not less than 1000 psi.

5-05. (b) (3) *Permissible Distortion of Face or Edges:* Distortions of the face from a plane, or the edges of the face from a straight line when measured as the maximum ordinate from the plane or line to the face or edge shall not exceed the amount given below.

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TABLE I

Standard face dimensions (height and length) in inches:	*Maximum permissible distortion in inches* 1
2⅜ x 7¾	3/64
5 1/16 x 7¾	1/16
5 1/16 x 11¾	3/32
3¾ x 11¾	3/32
7¾ x 11¾	5/32
7¾ x 15¾	3/16

(4) *Compressive Strength:* Test for compressive strength shall be made in accordance with the methods described in Federal Specifications SS-T-341a.

• • • • •

ADDENDUM NO. 1

SPECIFICATION

• • • • •

(11) Par. 4-01, Page 4-1. In the fourth line of this paragraph, delete "installation of brick and structural tile masonry" and substitute the following therefor: "installation of brick, structural tile and concrete block masonry."

(12) Par. 4-02, Page 4-1. Add the following at the end of this paragraph: "SS-C-621. Concrete Units; Masonry, Hollow."

(13) Par. 4-03 (g) (2), Page 4-3. After this subparagraph, add the following subparagraphs:

(h) *Concrete Masonry Units:* Concrete masonry units may be used, at the contractor's option, instead of the corresponding type of structural clay tile and shall conform to the following:

(1) *Load-Bearing Units:* Load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type I, with weight of concrete 100 pounds or less per cubic foot. Units shall be of standard sizes and shapes including closers, and shapes required by the construction, shall be free of any deleterious matter that will stain plaster or corrode metal, and shall be adequately cured before shipment.

(2) *Non-Load-Bearing Units:* Non-load-bearing concrete masonry units shall conform to the requirements of Federal

Specification SS-C-621, Type II, with weight of concrete 100 pounds or less per cubic foot.

(14) Par. 4-04, Page 4-3. Add the following at the end of this paragraph:

"Concrete masonry units—2 of each type."

(15) Par. 4-06 (c), Page 4-5. Insert in the title of this subparagraph and in the first line after "structural clay tile" the following: "or concrete masonry units."

(16) Par. 5-02, Page 5-1. Delete the word "tile" appearing in the third and fifth line of this paragraph and substitute the words "facing unit" therefor.

* * * * *

This case turns upon the meaning of the phrase "structural unglazed units." Plaintiffs assert that the term excludes facing tile and insist that defendant's requirement that facing tile be used where the plans and specifications called for "structural unglazed units" imposed an unauthorized additional expense upon the contractors for which defendant is liable. It is defendant's position that the phrase "structural unglazed units" means facing tile.

A scrutiny of the contract and specifications makes the question of interpretation relatively simple. The Finish Schedule on the key sheet provides that wall finishes 50 and 51 shall be "struc. unglazed units." Section 4 defines structural clay tile which admittedly is not facing tile and makes no reference to structural unglazed units. However, section 5 is headed "Masonry: Structural Facing Units" and in the first sentence of subsection 5-04 it provides that "Structural facing tile * * * shall be glazed and unglazed units as hereinafter specified." The last sentence of subsection 5-04 states that "Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units." Subsection 5-05 (b) (2) defines smooth unglazed units as follows: "All smooth unglazed units shall be type FTX, heavy-duty, select quality. The body of all smooth unglazed units shall be manufactured of fireclay. The face or faces that will be exposed when units are in place shall be free from cracks and shall have a smooth, unbroken, natural-die finish. The color of the faces shall be BUFF and shall conform to the approved samples. The finished face or faces

of the smooth unglazed units shall be free from chips and other imperfections detracting from the appearance of the finished wall when viewed from a distance of 10 feet. * * *."

Section 4 was amended to permit the use of cinder block as an alternative to structural clay tile. The evidence shows, as testified to by plaintiffs' witnesses Allen and Bingham, that either of these materials is appropriate when appearance is not a primary consideration. It is significant that no similar amendment was made to section 5, and cinder block could not be a substitute under this section.

It is clear that appearance was a primary consideration in section 5, especially in view of the fact that color was one of the requirements. Moreover, defendant's exhibit 2 —Buff fireclay facing tile, which is required to be installed where structural unglazed units were specified—is the only tile meeting the color test and other specifications for smooth unglazed units. Further proof of this is the fact that before any question about the proper interpretation of section 5 was presented, Mr. Brown, defendant's liaison engineer, discovered that plaintiffs were installing cinder block in a basement room where the Finish Schedule called for "structural unglazed units." Plaintiffs were permitted to correct their error by covering the cinder block wall with matte glazed tile, a nonstructural facing tile, *thereby producing the same appearance* that would have been provided had the structural unglazed units been used. Furthermore, plaintiffs installed the matte glazed tile without protest and without claim for additional costs.

It is conceded in plaintiffs' brief that the smooth unglazed units described in subsection 5-05 (b) (2) are facing tile. "Structural facing tile" is the subject of subsection 5-04, providing that structural facing tile shall be "glazed and unglazed units as hereinafter specified." Accordingly,

structural unglazed units are thereinafter specified to be smooth unglazed units. Thus structural facing tile are smooth unglazed units as described in subsection 5-05 (b) (2) which plaintiffs concede are "structural unglazed facing tile."

Reduced to simple terms section 5 is headed "Masonry: Structural Facing Units." Subsection 5-04 calls for structural facing tile to be installed and further says structural

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facing unglazed units shall be smooth unglazed units. Subsection 5-05 (b) (2) defines smooth unglazed units, which obviously could only include "facing tile," for the reason, in addition to the requirements in subsection 5-05 (b) (2), the evidence shows that the question of "glazed" or "unglazed" could only apply to facing units.

Therefore, the phrase "structural unglazed units" could only mean facing tile under a proper construction of the contract and specifications and would require the installation of facing tile where structural unglazed units are specified.

When the defendant required that unglazed facing tile be used where the plans and specifications called for "structural unglazed units" it was correctly interpreting the plans and specifications and the plaintiffs are not entitled to recover the additional costs incurred in the installation of facing tile. We, therefore, dismiss plaintiffs' petition.

It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Currell Vance, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff T. A. Loving & Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal offices at Goldsboro, North Carolina.

2. Plaintiff Southeastern Construction Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal offices at Charlotte, North Carolina.

3. The plaintiffs are engaged in business as general contractors for the construction of buildings and other works, and insofar as this petition is concerned, were and are acting as joint contractors and coadventurers.

4. On November 24, 1947, the office of the District Engineer, Huntington District, Corps of Engineers, U. S. Army, issued an invitation for bids for the construction of a Veterans' Administration Hospital at Beckley, West Virginia.

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The invitation was designated Serial No. W-46-022-eng 48-78 and was accompanied by specifications and drawings.

5. Plaintiffs formed a joint venture to undertake the performance of the general contract for the construction of the hospital at Beckley, entered their bid and the same was accepted. On February 19, 1948, Contract No. W-46-022-eng-1476 was executed between the plaintiffs and the United States for the construction of the Veterans' Administration Hospital and appurtenances, Beckley, West Virginia (except elevators, dumbwaiters and quarters). The contract price was $4,975,123.

6. The controversy in this case relates to the requirements of the contract and specifications for the finish of the walls in the garage and boiler house. This actual work was performed by a subcontractor, Southern Fireproofing Company, whose subcontract is in evidence at plaintiffs' Exhibit 2.

7. The portions of the specifications involved in the decision of the issue are set out below:

SC-2 *Drawings—contract drawings, maps and specifications.*—Ten sets of contract drawings, maps and specifications will be furnished the contractor without charge. Additional sets will be furnished on request at the cost of reproduction. The work shall conform to the following drawings, all of which form a part of these specifications and are available in the Office of the Corps of Engineers, Department of the Army, at Huntington, West Virginia.

Drawing No.:	*Title*
40-04-ASHPE-1	Key Sheet
32-01-A-2	Basement Floor Plan
36-13-A-2	Plans

SECTION 4

MASONRY: BRICK AND STRUCTURAL TILE

4-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of brick and structural tile masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

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402. APPLICABLE SPECIFICATIONS: The following Federal Specifications form a part of this specification:

HH-B-671c	Brick; Fire Clay.
QQ-B-71a	Barns; Reinforcement, (For) Concrete.
SS-B-656	Brick; Building (Common), Clay.
SS-B-681	Brick; Sand-Lime.
SS-T-316	Tile; Partition, Gypsum.
SS-T-341a	Tile; Structural, Clay, Load-Bearing, Wall.
SS-T-351a	Tile; Structural, Clay, Non-Load-Bearing.

4-03. MATERIALS: * * *

(g) *Structural Clay Tile:* Structural clay tile shall include all the standard shapes required to complete the construction, and shall conform to the following:

(1) *Load-Bearing Clay Tile: Load-bearing clay tile* shall conform to the requirements of Federal Specification SS-T-341a, grade LB, and shall be of design shown on drawings. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall have a plaster base finish.

(2) *Non-Load-Bearing Clay Tile:* Non-load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-351a. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall be scored to receive the plaster. The tile shall have a clear ring when struck.

SECTION 5

MASONRY: STRUCTURAL FACING UNITS

5-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of the structural-facing-unit masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

5-02. ALTERNATE C: Attention is invited to the fact that Alternate C provides for the elimination of painted walls above the structural glazed tile wainscot for Room Finishes Nos. 5, 14, 17, 18, 19, 21, 31 and 32 and in lieu thereof provides for the construction of the entire wall from floor to ceiling of structural glazed tile for such room finishes. The contractor will be required to perform such work in accordance with the contract which will indicate whether the construction contem-

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plated shall be in accordance with the basic specification or Alternate C.

5-03. APPLICABLE SPECIFICATION: The following Federal Specification forms a part of this specification:

SS-T-341a Tile; Structural, Clay, Load-Bearing, Wall.

5-04. GENERAL: Structural facing tile shall be installed in the spaces shown on the drawings and shall be glazed and unglazed units as hereinafter specified. Units shall be of the sizes indicated on the drawings, and all shapes and sizes shown or required for a complete and proper installation shall be furnished or cut on the job. Job cutting shall be by a motordriven saw designed for the purpose. Cut edges shall be clean and sharp. Backs of units upon which plaster is to be applied shall be scored, combed, or roughened. Beds, ends, and backs upon which mortar or plaster is to be applied shall be reasonably free from glaze. Units shall be delivered, stored, and handled in a manner that will protect them from stain and damage. Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units.

(p) *Special Shapes:* Bullnose corners, bullnose caps, flush coved base and round top coved base, slope sills, standard radials (radius 4-foot), and coved interior corners shall be furnished where shown or specified. Unless otherwise specified, all external vertical corners, and external corners of sills, and caps shall be bullnose, base shall be flush on top and coved to meet floor finish, and internal corners shall be square.

5-05. STRUCTURAL FACING UNITS:

(a) *General Requirements:* Except as otherwise specified herein, structural facing units shall conform to the requirements of Federal Specification SS-T-341a. Structural facing units shall be made of selected fusible materials of the types hereinafter specified, carefully proportioned, thoroughly mixed, and burned as straight and true as careful manufacture can achieve to produce a strong homogeneous body that will give a sharp metallic-bell-like ring when struck. The minimum thickness of the outside shell at any point shall be not less than 5/8 inch except that with side construction units with scored beds the minimum thickness of the top and bottom shells from the inner surface to the bottom of

the grooves shall be ½ inch, and with multicored units designed to be split for fractional lengths the minimum

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thickness from face to kerfing cores shall be ½ inch. Where a structural facing unit wainscot is required to be finished flush with plaster above, such units shall have all corners sharp and square.

(b) *Types and Qualities:*

(1) *Ceramic-Opaque-Glazed Fire-Clay Units:* The body of all ceramic-glazed fire-clay units shall be of clear-burning, plastic, fire clay. The face or faces that will be exposed when units are in place shall be free from cracks and shall be covered with an opaque ceramic glaze. The glaze shall be compounded of metallic oxides, chemicals and clays, thoroughly ground together and sprayed upon the previously formed body and then fused to the body by burning the units at high temperatures to give a matte finish. The texture of the finish shall be smooth and the color shall be the manufacturers standard shade of green or cream tan, and shall conform to the approved samples. The glaze of select quality, ceramic-glazed fire-clay units shall be free from chips, crazes, blisters, crawling, or other imperfections detracting from the appearance of the finished wall when viewed from a distance of 5 feet. The faces of the units shall pass the tests hereinafter specified for imperviousness, opacity, fading, and resistance to crazing. Overall dimensions of the face of units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the face of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 10 percent and for an average of 5 units shall be 8 percent. Requirements for minimum absorption will be waived. The minimum compressive

strength of any one end-construction unit shall be 2500 psi and of any one side-construction unit shall be 1500 psi. The average compressive strength of 5 end-construction units shall be not less than 3000 psi and of 5 side-construction units shall be not less than 2000 psi.

(2) *Smooth Unglazed Units:* All smooth unglazed units shall be type FTX, heavy-duty, select quality. The body of all smooth unglazed units shall be manufactured of fireclay. The face or faces that will be exposed when units are in place shall be free from cracks and shall have a smooth, unbroken, natural-die finish. The color of the faces shall be BUFF and shall conform

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to the approved samples. The finished face or faces of the smooth unglazed units shall be free from chips and other imperfections detracting from the appearance of the finished wall when viewed from a distance of 10 feet. Units having surface chips not in excess of ⅛ inch in from edges and ¼ inch in from corners will not be rejected. The faces of the units shall be highly resistant to staining and easily cleaned. Over-all dimensions of the face of the units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the faces of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of Table I below. The maximum absorption of any one unit shall be 9 percent and for an average of 5 units shall be 7 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2000 psi and of any one side-construction unit shall be 1000 psi. The average compressive strength of any 5 end-construction units shall be not less than 2500 psi and of 5 side-construction units shall be not less than 1000 psi.

5-05. (b) (3) *Permissible Distortion of Face or Edges:* Distortions of the face from a plane, or the edges of the face from a straight line when measured as the maximum ordinate from the plane or line to the face or edge shall not exceed the amount given below.

TABLE I

Standard face dimensions (height and length) in inches	*Maximum permissible distortion in inches* 1
2⅝ x 7⅝	3/64
5 1/16 x 7⅝	1/16
5 1/16 x 11¾	3/32
3⅝ x 11¾	3/32
7⅝ x 11¾	5/32
7⅝ x 15⅝	3/16

(4) *Compressive Strength:* Test for compressive strength shall be made in accordance with the methods described in Federal Specifications SS-T-341a.

8. On December 19, 1947, Addendum No. 1 was issued by the Huntington District Engineer which amended the Specifications accompanying the invitation for bids. The material amendments contained in Addendum No. 1 are as follows:

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SPECIFICATION

* * * * *

(11) *Par. 4-01, Page 4-1.* In the fourth line of this paragraph, delete "installation of brick and structural tile masonry" and substitute the following therefor: "installation of brick, structural tile and concrete block masonry."

(12) *Par. 4-02, Page 4-1.* Add the following at the end of this paragraph: "SS-C-621. Concrete Units; Masonry, Hollow."

(13) *Par. 4-03 (g) (2), Page 4-3.* After this subparagraph, add the following subparagraphs:

(h) *Concrete Masonry Units:* Concrete masonry units may be used, at the contractor's option, instead

of the corresponding type of structural clay tile and shall conform to the following:

(1) *Load-Bearing Units:* Load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type I, with weight of concrete 100 pounds or less per cubic foot. Units shall be of standard sizes and shapes including closers and shapes required by the construction, shall be free of any deleterious matter that will stain plaster or corrode metal, and shall be adequately cured before shipment.

(2) *Non-Load-Bearing Units:* Non-load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type II, with weight of concrete 100 pounds or less per cubic foot.

(14) *Par. 4-04, Page 4-3.* Add the following at the end of this paragraph:

"Concrete masonry units—2 of each type."

(15) *Par. 4-06 (c), Page 4-5.* Insert in the title of this subparagraph and in the first line after "structural clay tile" the following: "or concrete masonry units."

(16) *Par. 5-02, Page 5-1.* Delete the word "tile" appearing in the third and fifth lines of this paragraph and substitute the words "facing unit" therefor.

* * * * *

9. Additional addenda were issued on January 6, 1948, and January 26, 1948, but did not alter the specifications in any way material to this case.

10. The contract contained the standard clauses, particularly covering changes and disputes concerning questions of fact.

11. The plaintiffs and the subcontractor had embarked upon performance of their respective contracts when it was

discovered by the Government's liaison engineer on the Beckly and Clarksburg jobs, Samuel F. Brown, that cinder blocks were being used where finish schedule No. 50 on the

key sheet called for "Struc. Unglazed Units." This work had been done in a basement room marked B061 of the main building, and its discovery by Mr. Brown was the first indication he had that the contractor was so interpreting the requirements of the finish schedule and the specifications. Rather than have the completed structure torn out, plaintiffs were allowed to cover the cinder block with matte glazed tile (a facing tile), which produced the same appearance that would have been provided had the structural unglazed units called for been used. Plaintiffs made the necessary adjustments without protest and without claim for additional costs.

12. Following his discovery that cinder block had been used where structural unglazed units were specified, Mr. Brown cautioned the Government's resident engineer to make sure that the proper finish was used in the garage and boiler house where the finish schedule required structural unglazed units to be installed. Accordingly, the resident engineer instructed the plaintiffs.

13. Thereafter, plaintiffs placed unglazed facing tile in the areas designated on the plans to receive Finish 51. They then applied to the contracting officer for additional compensation in the amount of $19,284.29, representing the difference in the cost of installing facing tile over cinder block.

14. Plaintiffs' claim in the sum of $19,284.29 for the additional costs, together with overhead and profit to the subcontractor and the plaintiffs, involving the use of facing tile as compared with cinder block, is itemized as follows:

SOUTHEASTERN CONSTRUCTION CO. AND T. A. LOVING & CO.

[Statement of additional cost on account of requirement to use unglazed facing tile, type FTX, in areas of boiler house and garage marked "finish No. 51," in lieu of cinder block or structural tile]

Exterior Walls

Add:			
4,862 sq. ft. 8" UFT S1S	@$1.69	$ 8,216.78	
465 lin. ft. B/N corners	.50	232.50	
		8,449.28	
Deduct:			
4,862 sq. ft. 8" Cind. Bl. S1S	.64	3,111.68	
Net add a/c exterior			$ 5,337.60

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Interior Partitions

Add:			
338 sq. ft. 12" UFT S1S	$1.93	$ 652.34	
3,655 sq. ft. 8" UFT S2S	2.58	8,429.90	
1,317 sq. ft. 8" UFT S1S	1.69	2,225.73	
741 sq. ft. 4" UFT S1S	1.29	955.89	
27 sq. ft. 4" UFT S2S	1.39	37.53	
248 lin. ft. B/N Corners	.50	124.00	
		13,425.39	
Deduct:			
338 sq. ft. 12" Cind. Bl. S1S	1.16	392.08	
3,655 sq. ft. 8" Cind. Bl. S2S	.65	2,375.75	
1,317 sq. ft. 8" Cind. Bl. S1S	.64	842.88	
741 sq. ft. 4" Cind. Bl. S1S	.52	385.32	
27 sq. ft. 4" Cind. Bl. S2S	.52	14.04	
		4,010.07	
Net add a/c interior			9,415.32
Claim of subcontractor			14,752.92
Overhead 15.00% on $14,752.92			2,212.94
Profit 10.00% on $16,965.86			1,696.59
Bond 1.00% on $18,662.45			186.62
State Tax 1.80% on $18,849.07			339.28
City Tax .50% on $19,188.35			95.94
Total			$19,284.29

The actual costs of $14,752.92 to the subcontractor are established by the proof. The other items are calculations therefrom.

15. Said claim was denied by the contracting officer, and also denied on appeal to the Army Board of Contract Appeals of the Corps of Engineers, as the representative of the Secretary of the Army.

16. Plaintiffs have testified that they have acknowledged liability to the subcontractor for its part of the claimed

recovery, as shown in finding 14 above, at least to the extent of any recovery which may be secured.

17. It is admitted that the finish indicated for the walls of the cellar and boiler house is No. 51. By reference to the key sheet, plaintiffs' Exhibit 8, and the finish schedule therein set forth, it is noted that wall finish 51 is described as "Struc. Unglazed Units." The defendant calls attention to the fact that these three words used together appear

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only in Section 5-04 of the specifications under the general title of Section 5, to wit, "Masonry: Structural Facing Units." It is not contended by the plaintiffs that such words in Section 5-04 should not have been identified as those called for on the key sheet.

18. Plaintiffs further concede that in the same sentence of Section 5-04, structural unglazed units are identified as smooth unglazed units. However, plaintiffs say that the expression "smooth unglazed units" is not sufficiently definite to indicate facing tile, and can comprehend concrete cinder block. However, there is a special section of Section 5, designated as 5-05 (2), giving a detailed description of smooth unglazed units, which clearly sets forth requirements which designate facing tile and are not satisfied by concrete cinder block.

It is conceded that the full self-contained description of the finish which plaintiffs were required to install in the disputed areas is "structural unglazed facing units." However, the expression "structural facing units" would not be sufficiently definite, because such units might be either glazed or unglazed. In the trade the expression is sometimes abbreviated to omit the word "facing," and the designation may be either "structural glazed units" or "structural unglazed units." It appears that the use of the word

"unglazed" indicates in the trade that a product is called for which might in some instances be either glazed or unglazed, and is not understood to apply to a product such as concrete cinder block.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

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CITATION

Case:

Ralph Sollitt & Sons Construction Co. v. *United States*, 80 C. Cls. 798 ..... 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 365

T. A. LOVING & COMPANY AND SOUTHEASTERN CONSTRUCTION COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-25a) is reported at 132 F. Supp. 250.

JURISDICTION

The judgment of the Court of Claims dismissing the petition was entered on June 7, 1955. The petition for a writ of certiorari was filed on August 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners were properly required to use facing tile in the construction of a Veterans Administration hospital when "structural unglazed units" were specified on the finish schedule.

STATEMENT

Petitioners were the contractors (in a joint venture) for the construction of a Veterans Administration hospital in Beckley, West Virginia. The contract was entered into on February 19, 1948 at a price of $4,975,123. (Pet. App. 14a.)

The plans for the boiler house and garage of the proposed hospital required "finish 51" and the finish schedule specifies that the walls for finish 51 are to be "Struc. Unglazed Units." (Pet. App. 24a). While petitioners contend that these specifications would have been satisfied by the use of cinder block, they were required by the Government to use facing tile for the boiler house and garage walls. (Pet. App. 2a, 22a). In this action, they seek to recover the additional cost of installing the facing tile, in the amount of $19,284.29. $14,752.92 of the claim represents costs of the subcontractor, Southern Fireproofing Company, who was employed to construct these interior walls (Pet. App. 22a-23a).

Brown, the Government's liaison engineer on the project, testified that disagreement with petitioners concerning the meaning of "structural unglazed units" first occurred when he observed the installation of cinder blocks in the basement rooms in the

hospital for which this finish was specified. Petitioners were permitted to cover the exposed cinder blocks with matt glazed tile one inch thick, to give the same appearance as a facing unit, and did so without protest or claim for additional costs.[1] Brown then instructed the resident engineer to make certain that facing tile was installed wherever "structural unglazed units" were specified. (Pet. App. 21a-22a; Tr. 130-1, 140-3, 145-6.) The subsequent installation in the garage and boiler house led to the instant claim, which was denied by the contracting officer and the Army Board of Contract Appeals for the Corps of Engineers, acting for the Secretary of the Army (Pet. App. 23a).

Sections 4 and 5 of the specifications, set forth at Pet. App. 15a-20a, are the pertinent provisions of the specifications. Section 4 is entitled "Masonry: Brick and Structural Tile," and Section 5 deals with "Masonry: Structural Facing Units." Under the latter subject, Section 5.04 generally distinguishes between "glazed and unglazed units" of "structural facing tile" and then provides: "Structural glazed units marked in Finish Sched-

[1] While petitioners contend that this acquiescence was part of an "overall settlement" (Pet. 20; Tr. 186), Brown clarified this on redirect examination and disclosed that the settlement involved only the erroneous installation of cinder block and an additional minor adjustment (Tr. 188-90). Petitioners' prosecution of this action, despite its failure to contest Brown's previous decision, is perhaps explained by the fact that the work involved in the instant case was done by a subcontractor, who is the principal claimant here, and whose principal was the chief witness for petitioners.

ule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units." (Pet. App. 17a.) Section 5.05 sets forth the detailed requirements for these two types of "structural facing units": "ceramic-opaque-glazed fire-clay units" (5.05 (b)(1)) and "smooth unglazed units" (505(b)(2)) (Pet. App. 18a-19a). Addendum No. 1 amended Section 4 to permit the use of cinder block instead of the structural clay tile there described (Pet. App. 20a-21a). Section 5 was not so amended. It is clear that cinder block is a reasonable equivalent for nonfacing tile, but not for facing tile which must meet specifications for appearance (Pet. App. 12a; Tr. 19, 57, 214, 216).

Plaintiff's position at the hearing was that the words "structural unglazed units" in finish 51 plainly referred to non-facing units, since the word "facing" was absent, and that consequently reference solely to Section 4 of the specifications was demanded and cinder blocks could be used (Tr. 8, 50-2, 66). In their subsequent argument to the Court of Claims, and in the petition to this Court, plaintiffs have urged, in addition, that Section 5.04 of the specifications—containing the term "structural unglazed units"—refers to nonfacing units (Pet. 18, 21-24).

The court below held that the use of "structural unglazed units" in Section 5.04 of the specifications clearly relates to facing units and that, furthermore, the term "structural unglazed units" is used in the trade to designate facing units and is not

understood to apply to a product such as cinder block (Pet. App. 11a-12a, 24a-25a). The court believed that that "scrutiny of the contract and specifications makes the question of interpretation relatively simple" (Pet. App. 11a) and dismissed plaintiffs' petition.

ARGUMENT

The Court of Claims reached its conclusion that "structural unglazed units" means facing tile on the basis of its examination of the specifications and its evaluation of the conflicting testimony before it. The court also chose to believe the testimony of the Government witnesses. No ground for certiorari has been shown. The issue is primarily one of fact and no question of general importance is raised. However, in view of the detailed discussion in the petition we discuss the merits at some length.

1. In their petition to this Court, plaintiffs assert that it is "indisputable" that facing tile must be described by use of the word "facing" (Pet. 15). However, the Government's three witnesses testified unequivocally that in the trade "structural unglazed unit" customarily means facing tile (Tr. 152-3, 174, 206, 213-4). Mr. Allen, Chief Engineer of the Structural Clay Products Institute, made this point succintly (Tr. 213):

> Q. Mr. Allen, will you tell us what the phrase "structural unglazed unit" means in the clay products industry?
>
> A. By common usage the term "structural unglazed unit" would ordinarily mean a unit

that is considered to be a facing unit, for the reason that the term "unglazed" is not ordinarily used in describing a structural tile not intended for facing purposes.

Q. Well, what phrase would be used if a structural tile not intended for facing purposes was to be indicated?

A. A structural clay load-bearing or nonload-bearing tile.

In his testimony, Mr. Allen later reiterated that, ". . . as I mentioned, the term 'unglazed' is usually applied only to facing units to distinguish them from glazed facing units" (Tr. 214). And on redirect examination, he further explained that, since a structural facing unit may be either glazed or unglazed, the term "structural unglazed unit" is used as a more specific definition than "structural facing unit" (Tr. 217-8). When asked to identify the "structural unglazed units" among the exhibits, Allen pointed out the facing tile (Tr. 214).

It is apparent from the court's finding as to the meaning of the terms in the trade (Pet. App. 24a-25a) that strong reliance was placed on Allen's testimony. The court properly believed this disinterested and reputable expert, whose testimony was concurred in by the other Government witnesses. It should be noted, moreover, that while petitioners' witnesses stated that "facing" is the necessary distinguishing word (Tr. 24, 60) and that nonfacing structural units also come both glazed or unglazed (Tr. 20, 58), they conceded that nonfac-

ing units are ordinarily unglazed and that consequently, in describing such units, the word "unglazed" is omitted; these units are called merely "structural units" unless a glaze is desired (Tr. 20, 58). This testimony is consistent with the Government's evidence and with the conclusion of the Court of Claims that the use of "unglazed" indicates that facing tile was required. The term "facing" is a part of the technically appropriate name of this tile (Tr. 218) but to persons in the trade "structural unglazed unit" is adequate and recognizable (Tr. 152-3, 174, 206, 213-4, 216, 218, 219).

2. In the instant case, the court's correct interpretation of "structural unglazed units" was inescapable, in view of the specifications which elaborate upon the terms of the finish sechedue. Sections 4 and 5 set forth the requirements for masonry generally and, patently, Section 4 deals with nonfacing structural units ("Masonry: Brick and Structural Tile") while Section 5 covers facing tile ("Masonry: Structural Facing Units").

Consistent with the testimony of the Government witnesses, it is only in the description of facing tile, in Section 5, that a distinction is made between glazed and unglazed units; and, furthermore, facing tile is described at some points in the specifications without the use of the word "facing". Thus, Section 5.04 states that "Structural facing tile shall be * * * glazed and unglazed units as hereinafter specified," and defines the kinds of glazed and unglazed facing to be used on this job:

"Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units." "Ceramic-Opaque-Glazed Fire-Clay Units" and "Smooth Unglazed Units" are the subjects of detailed description in Section 5.05. From these provisions, it is apparent that "structural unglazed units" was used to mean facing tile.

At the hearing, petitioners recognized the dichotomy between Sections 4 and 5 and sought to persuade the Commissioner that only Section 4's nonfacing units were indicated by "structural unglazed units" and that reference to Section 5 was unwarranted (Tr. 8, 50-52, 66). However, this theory was belied by the express use in Section 5.04 of the term "structural unglazed units." And petitioners' contention thereafter that Section 5.04 relates to nonfacing units is likewise untenable (Pet. 18, 21-24). Section 5.04's "structural unglazed units" are clearly a type of facing tile. This is evident from the heading of the entire Section 5, the context of Section 5.04, and the later description of "smooth unglazed units" in Section 5.05(b)(2) which is conceded to mean facing tile (Pet. App. 21-24); Section 5.04 explicitly noted that the finish schedule's "structural unglazed units" were to be such "smooth unglazed units."[2]

---

[2] The decision in *Ralph Sollitt & Sons Construction Co.* v. *United States*, 80 C. Cls. 798, relied upon by petitioners

Petitioners' supporting evidence that 5.04 refers to nonfacing units is illusory. First, the Federal Specification SS-T-341a, incorporated by Section 5.03, does not involve nonfacing units, as urged by petitioners (Pet. 21). It describes load-bearing standards and applies equally to facing or nonfacing units (Tr. 42-44, 63-65). Secondly, while petitioners say that facing tile is always smooth (Pet. 23), the record shows that it may be either smooth or rough (Tr. 23-24). Consequently, the distinguishing term "smooth", as well as "unglazed", was a necessary part of the specification for the facing tile. Section 5.04 clearly referred to facing tile, and by thus defining "structural unglazed units" as used in the finish schedule, reinforces the recognized meaning of that phrase in the trade to substantiate the decision below.

(Pet. p. 17), held that the contractor there could use unglazed rather than glazed tile because an addendum to the specifications permitted "vitrified fire-clay tiles" to be substituted for "glazed vitrified fire-clay tiles." No analogous problem of interpretation is involved here. Moreover, both kinds of tiles involved in Sollitt were evidently facing units (80 C. Cls. at 800, 806). Since the court there underlined the distinction between glazed and unglazed facing (stressed by the Government witnesses in the instant case) and discussed facing tile without the use of word "facing," that decision supports the Government's position here.

CONCLUSION

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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